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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re ALEX C., a Person Coming Under the  
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

ESTER M.,

Defendant and Appellant.

D043265

(Super. Ct. No. SJ01123)

APPEAL from a judgment of the Superior Court of San Diego County, William E. Lehnhardt, Judge. (Retired judge of the Imperial County Sup. Ct., assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed.

Ester M. (Mother) appeals the judgment terminating her parental rights over Alex C., contending the San Diego County Health and Human Services Agency (the Agency) violated the notice provisions of the Indian Child Welfare Act (ICWA)

(25 U.S.C. § 1901 et seq.). Mother's counsel, Alex's counsel, and the Agency's counsel have filed a stipulation for reversal of the juvenile court's judgment, remand for a new Welfare and Institutions Code section 366.26<sup>1</sup> hearing with proper ICWA notice, and immediate issuance of the remittitur. We accept the stipulation (Code Civ. Proc., § 128, subd. (a)(8); *In re Rashad H.* (2000) 78 Cal.App.4th 376) and reverse.

## BACKGROUND

In May 2003, just days after Alex's birth, the Agency filed a dependency petition because he and Mother both tested positive for opiates; he suffered withdrawal symptoms; and she admitted drug use during pregnancy, had had no prenatal care, and had failed to reunify with four other children. Alex was detained in the hospital, then detained and placed with his half sister (Mother's adult daughter), who was willing to adopt him.

In the detention report, the social worker stated, "[ICWA] does or may apply. I was unable to speak with the mother." At the detention hearing, the court deferred the ICWA issue until the jurisdictional and dispositional hearing. At the June 18, 2003 jurisdictional and dispositional hearing, the court continued the matter to allow the Agency to give notice to an Apache tribe. In the jurisdictional and dispositional report, the social worker stated that Alex's half sister had said that there might be American Indian heritage in her family, she would ask family members for more information, and

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<sup>1</sup> Further statutory references are to the Welfare and Institutions Code unless otherwise specified.

she was not registered with a tribe and did not believe anyone else was. The social worker promised to notify the court upon obtaining more information. In an addendum report filed July 17, 2003, the social worker said she had received letters from five Apache tribes stating Alex was not enrolled or eligible for enrollment, and she was waiting for letters from the four remaining tribes. Attached to the report were the five letters.

At the July 17, 2003 jurisdictional and dispositional hearing, the court stated: "In this case it sounds like all the ICWA notices have been sent out. Quite a few replies have been received that the tribes are not going to become involved. They were sent out apparently quite some time ago so that the notice period has gone by. It seems to me we could proceed." After the Agency's counsel requested a finding that ICWA did not apply, the court stated, "We haven't received all the replies. We've had a sufficient time to reply. I hear no objection. I do find [ICWA] does not apply."

In her section 366.26 assessment report, the social worker stated, "[L]etters were . . . received by the [A]gency from all 10<sup>2</sup> Apache tribes stating that Alex [C.] is not a member of the different Apache tribes. Some of these letters were attached to previous court reports and on file." At the November 13, 2003 section 366.26 hearing, the court terminated the parental rights of Mother and of Alex's alleged father.

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<sup>2</sup> We note that this differs from the social worker's previous implication that there were nine Apache tribes.

According to the parties' joint application and stipulation for reversal, "the Agency and the juvenile court failed to comply with the requirements of current case law regarding ICWA notices[; t]he appellate record is devoid of any proof of notices to the Indian tribes and Bureau of Indian Affairs[;] the juvenile court erred when it solely relied upon the letters from the Indian tribes stating Alex was not eligible for membership when it found the ICWA did not apply[; and] the juvenile court should have required the proper noticing standards under current case law. (*In re Karla C.* (2003) 113 Cal.App.4th 166, 175-176; *In re C.D.* (2003) 110 Cal.App.4th 214, 223.)"

#### DISCUSSION

"An appellate court shall not reverse or vacate a duly entered judgment upon an agreement or stipulation of the parties unless the court finds both of the following: [¶] (A) There is no reasonable possibility that the interests of nonparties or the public will be adversely affected by the reversal. [¶] (B) The reasons of the parties for requesting reversal outweigh the erosion of public trust that may result from the nullification of a judgment and the risk that the availability of stipulated reversal will reduce the incentive for pretrial settlement." ( Code Civ. Proc., § 128, subd. (a)(8).)

Our independent review of the record, summarized above, leads us to conclude that we should accept the stipulation for reversal. First, there is no reasonable possibility that reversal will adversely affect the interests of nonparties. A stipulated reversal will expedite the ICWA notice process, to the benefit of the prospective adoptive parent. (*In re Rashad H., supra*, 78 Cal.App.4th at pp. 380-381.) Nor is there a reasonable

possibility that reversal will adversely affect the interests of the public. This is not a public matter or one affecting the public.

Second, the reason the parties request reversal is to allow compliance with ICWA. Because a stipulated reversal will expedite the ICWA notice process, the public trust will not be eroded. On the contrary, public trust in the courts and their judgments will be advanced by knowing that the Agency, counsel, and the courts will seek to correct errors promptly and reasonably, avoiding delays that might affect children and families. (Cf. *In re Rashad H.*, *supra*, 78 Cal.App.4th at p. 381.) Nor will reversal run the risk of reducing any incentive for pretrial settlement.

#### DISPOSITION

The judgment terminating Mother's parental rights is reversed.<sup>3</sup> This matter is remanded to the juvenile court, with directions that it (1) require the Agency to give proper ICWA notice to the tribes and Bureau of Indian Affairs and (2) hold a new section 366.26 hearing. If, at the new section 366.26 hearing, the court determines ICWA notice was proper and a tribe does not seek to intervene or otherwise indicate Alex is an Indian

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<sup>3</sup> Alex's alleged father has not appealed the termination of his parental rights and that termination is now final. The stipulation for reversal does not affect his parental rights, which remain terminated. (*Los Angeles County Dept. of Children & Fam. Services v. Superior Court* (2000) 83 Cal.App.4th 947, 949.)

child as defined by ICWA, the court shall reinstate all of its previous findings and orders, including the termination of parental rights. The remittitur is to issue forthwith.

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O'ROURKE, J.

WE CONCUR:

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HUFFMAN, Acting P. J.

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HALLER, J.